Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CARL PEASE,
Petitioner

v.

YELLOWSTONE COUNTY, a political subdividion of the State of Montana
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a tribal court have jurisdiction to enter a declaratory judgment against a county concerning taxation of land on an Indian reservation owned in fee by a member of the tribe?

PARTIES TO THE PROCEEDINGS

There are no parties other than the petitioner and respondent identified in the caption of this matter.

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PETITION FOR A WRIT OF CERTIORARI

Carl Pease respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a -19a) is reported at 96 F.3d 1169. The opinion of the district court (App. B, *infra*, 20a-27a) is unreported. The opinion of the Crow Court of Appeals (App. C, *infra*, 28a-34a) is reported at 21 Ind. Law Rep. 6109. The

memorandum of the tribal trial court (App. D, 35a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1996. A petition for a rehearing was denied October 25, 1996. (App. E, *infra,* 40a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents an issue of federal common law. No specific constitutional or statutory provisions are involved.

STATEMENT

Pease, a member of the Crow Tribe, owns 80 acres in fee simple on the Crow Indian Reservation. Pease obtained the land from his father, George Pease, the original allottee, by means of an *inter vivos* transfer. George Pease had been issued a fee patent despite the fact that he had never requested that the land be removed from trust. Carl Pease brought an action in the Crow Tribal Court seeking declaratory and injunctive relief against Yellowstone County to prohibit future taxation or sale of the land for delinquent taxes. No monetary relief

was sought.

In the tribal court the parties stipulated to the entry of a preliminary injunction and a stay of the matter pending the decision of this Court in *Yakima Indian Nation v. Yakima County*, 502 U.S. 251 (1992). After the *Yakima* decision, the parties moved to lift the stay and the tribal court lifted the stay shortly after the Ninth Circuit's decision in *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993). The parties then stipulated to the facts and submitted the matter to the tribal trial court on cross motions for summary judgment.

The tribal trial court held that the state constitution barred Montana from imposing taxes on Pease's land. App. D, *infra*. The County appealed that judgment to the tribal appellate court. The county raised the issue of tribal jurisdiction for the first time in its reply brief on appeal. The Crow Court of Appeals found it had jurisdiction and held Pease's land was not taxable as a matter of federal law. App. C, *infra*. The County then filed an action in the federal district court seeking a declaration that County could tax the land and that the Crow Tribe lacked jurisdiction over the matter. The district court based its jurisdiction upon 28 U.S.C. § 1331, federal question jurisdiction. The district court entered a memorandum order granting the County summary judgment on the issue of the Tribe's jurisdiction, but did not rule on the merits of the underlying tax issue. App. B, *infra*. Pease appealed that judgment to the Ninth Circuit which affirmed the district

court, holding the tribe lacked sufficient interest in the dispute to assert jurisdiction over the matter. App. A, *infra*.

REASONS TO GRANT PETITION

I. THIS COURT SHOULD GRANT, VACATE AND REMAND IN LIGHT OF *A-1 CONTRACTORS*.

This case deals with the jurisdiction of an Indian tribe over non-Indians in actions arising on reservation. In the decision below, the Ninth Circuit relied extensively on the Eighth Circuit decision in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (en banc). *See*, Appendix A at 13a-15a. After the Ninth Circuit decision in this case, this Court granted certiorari in *Strate v. A-1 Contractors*, 117 S.Ct. 37 (1996)(No. 96-1872).

Both the Eighth Circuit in *A-1 Contractors* and the Ninth Circuit in the opinion below noted some "tension" between the decisions of this Court in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 10 (1987) and *Montana v. United States*, 450 U.S. 544 (1981). *See, A-1 Contractors* at 76 F.3d 938-39, *Yellowstone County v. Pease*, *infra*, at 14a-15a. It is likely that *A-1 Contractors* will shed light on this "tension" and the general issue of tribal jurisdiction over non-Indians.

If *A-1 Contractors* is reversed then a "grant, vacate and remand" in this matter would allow the Ninth Circuit to determine if the matter falls within the scope of tribal jurisdiction recognized in *A-1 Contractors*.

Even if *A-1 Contractors* is affirmed, the Ninth Circuit should be given the opportunity to determine if any part of the holding in *A-1 Contractors* would change the position taken by the panel below. For example, this Court could affirm *A-1 Contractors* on the narrow ground that all parties are non-Indian but imply that tribal jurisdiction exists when one party is a tribal member, as is the case here. Tribal jurisdiction in this case might also be greater since this action involves land owned by a tribal member while *A-1 Contractors* involves a tort on a state highway. Whether *A-1 Contractors* is reversed or affirmed, it would be appropriate to grant the petition for certiorari, vacate the decision below and remand for further proceedings consistent with the decision of this Court in *A-1 Contractors*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted,

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JANUARY 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed September 11, 1996]

Before: Eugene A. Wright, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

OPINION

O'Scannlain, Circuit Judge:

We must decide whether an Indian tribal court has subject matter jurisdiction to entertain an action challenging a county's right to impose property taxes on

reservation land held in fee by a member of the tribe.

I

Carl Pease, a member of the Crow Tribe of Indians ("the Tribe") in Montana, appeals from the district court's summary judgment for Yellowstone County (the "County") in the County's action seeking a declaratory judgment that the Crow Tribal Court exceeded its jurisdiction by ruling that Pease was not required to pay property taxes imposed by the County. Pease owns fee title to real property located within the boundaries of the Crow Reservation. The property was allotted and patented in fee to Pease's father under the Crow Allotment Act of 1920, 41 Stat. 750.[1] Pease has failed to pay his state property taxes from 1987 to the present. In July 1991, he filed an action in Crow Tribal Court seeking to enjoin Yellowstone County from imposing state property taxes on his land. The parties agreed to stay the tribal court action pending the Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S. Ct. 683 (1992) (holding that states could impose an ad valorem property tax on fee land that had been allotted under the General Allotment Act). After the Court decided *Yakima,* the tribal court lifted the stay. The parties stipulated to the facts and submitted cross motions for summary judgment.

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[1]"Patented in fee" refers to Indian land held in fee by an individual Indian, as opposed to land held in trust for the tribe by the federal government. Felix S. Cohen's Handbook of Federal Indian Law, 605-19 (Rennard Strickland et al. eds., 1982).

The tribal court concluded that Montana's Constitution bars the County from imposing taxes on Pease's land, and enjoined the County from issuing a tax deed or tax sale certificate. The County appealed to the Crow Court of Appeal, which held that the Crow tribal courts had jurisdiction of the case and that the County could not tax Pease's land because it was allotted under the Crow Allotment Act, not the General Allotment Act.

The County brought an action in federal district court seeking a declaration that the tribal court lacked jurisdiction over Pease's case and that the County could tax Pease's land. The County later withdrew its request for a declaration that the County could tax Pease's land.[2] Relying on *Montana v. United States*, 450 U.S. 544 (1981), the district court granted the County's motion for summary judgment, holding that tribal courts do not have jurisdiction over the subject matter of the case. *Yellowstone County v. Pease*, No. CV 94-131-BLG-JDS (D. Mont. July 26, 1995) (memorandum and order). The district court granted the County's unopposed motion for entry of final judgment, and entered judgment on September 13, 1995, thus vacating the tribal court decisions. Pease timely filed a notice of appeal.

II

As a threshold matter, we reject Pease's contentions

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[2]The County "believes Pease's defenses to his tax liability are properly resolved in state administrative and judicial proceedings." Accordingly, the district court did not reach the merits of the underlying tax issue.

that the district court (1) should have dismissed the County's action for failure to exhaust tribal remedies, and (2) abused its discretion in failing to conclude that the Crow Tribe is an indispensable party.

A

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court held that a party must exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction. *Id.* at 857; see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("*National Farmers Union* requires that the issue of jurisdiction be resolved by the Tribal Courts in the first instance"). The Supreme Court concluded that the congressional policy of supporting tribal self-government "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers Union*, 471 U.S. at 856 (footnote omitted).

Although Pease concedes that "the [C]ounty exhausted tribal remedies," he contends that the County's failure to challenge tribal jurisdiction before filing its tribal appellate reply brief deprived the tribal court of a "full opportunity" to consider the jurisdictional issue and to develop a "full record." *See id.* at 856-57. The district court rejected Pease's contention, and concluded that the County exhausted its tribal remedies because "the Crow Court of Appeals ruled on its jurisdiction."

[1] Pease's contention lacks merit. As this court has stated: "Once all tribal remedies are exhausted and the

tribal courts finally decide that tribal jurisdiction exists, then the district court can decide the question of tribal jurisdiction." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1227 (9th Cir. 1989) (citing *National Farmers Union*, 471 U.S. at 852). Here, the tribal court clearly had a "full opportunity" to consider the jurisdictional issue because the Crow Court of Appeals actually and finally decided that tribal jurisdiction exists. Accordingly, the district court did not err in concluding that the County exhausted tribal court remedies.

B

We are also unpersuaded by Pease's contention that the district court abused its discretion by concluding that the "Crow Tribe is not an indispensable party, and [that] the Tribe would be bound by a judgment of this Court."

Under Federal Rule of Civil Procedure 19, a non-party is "indispensable" to an action if (1) the non-party is "necessary" under Rule 19(a); (2) the non-party cannot be joined (due to sovereign immunity, for example); and (3) the non-party's absence would mandate dismissal according to a weighing of the factors outlined in Rule 19(b). Because we conclude that the Tribe is not a necessary party, we need not advance to steps two and three.

This court undertakes a two-pronged analysis to determine whether a non-party is necessary under Rule

19(a).[3] If a non-party satisfies either of the two prongs, the non-party is necessary. First, we determine whether "complete relief" is possible among those already parties to the suit. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); see also *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500, 1501 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part) ("The relevant question for Rule 19(a) must be whether success in the litigation can afford the plaintiffs the relief for which they have prayed."). Second, we decide whether the non-party has a "legally protected interest in the suit." *Makah*, 910 F.2d at 558.

Pease contends that the County should have sued the Tribe or the tribal court because "it is the actions of the tribal court that the County seeks to void." Pease

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[3]Rule 19(a) describes persons to be joined if feasible:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

maintains that the County cannot obtain complete relief without joining the Tribe because the "Crow Tribe could continue to assert its jurisdiction and enforce the judgment of its court if it is not made a party to the action." Pease also contends that the Tribe has a legally protected interest in its "right to maintain a court system that can determine the rights of a tribal member and Yellowstone County to real property on the reservation."

Pease's contention that the district court's judgment is not binding on the Tribe is without merit for several reasons. First, the County's challenge to the tribal court's jurisdiction raises a federal question that is clearly within the jurisdiction of a federal district court. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) (citations omitted) ("[F]ederal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question."), *cert. denied*, 499 U.S. 943 (1991); *see National Farmers Union*, 471 U.S. at 852. Second, it is not necessary to join the tribal court as a party to Pease's suit for the simple reason that tribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts. *See, e.g., In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) (citations omitted) ("it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion"); *James v. Jones*, 148 F.R.D. 196, 203 (W.D. Ky. 1993) (holding that state judges were not necessary parties to action challenging constitutionality of state laws relating to detention of juveniles). Accordingly, the district court

provided complete relief to the County for the purposes of Rule 19(a).

Pease's contention that the tribal court has a legally protected interest in maintaining a court system that adjudicates property rights is also without merit. First, this case is not about the Tribe's right to tax reservation lands; rather, this action arose from Pease's claim that the County, a political subdivision of the State of Montana, is powerless to tax his fee-patented property. Second, concluding that courts are necessary parties under Rule 19(a) whenever their jurisdiction is challenged would lead to absurd results. Clearly, the County can seek to have the judgment obtained by Pease vacated on jurisdictional grounds without naming the tribal court as a defendant. Third, unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), here the Tribe cannot demonstrate that it is a party to a relevant commercial agreement, lease, trust, or treaty with one of the parties to the lawsuit.[4] Thus, the

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[4]*See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994) (governing tribe of reservation is necessary and indispensable party to suit challenging agency decision that fractional interests in trust property escheated to governing tribe under federal statute); *Confederated Tribes*, 928 F.2d at 1498 (Quinault Indian Nation is necessary and indispensable party to suit challenging the United States' continuing recognition of Quinault Indian Nation as the sole governing authority for the Quinault Indian Reservation); *Makah*, 910 F.2d at 558 (absent tribes holding treaty right to salmon are necessary parties to Makah's challenge to Department of Interior's inter-tribal fish allocation decision); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989)

tribal court does not have a legally protected interest that would be impaired or impeded by the County's suit.

[2] Accordingly, the district court did not err in holding that the Crow Tribe is not an indispensable party.

III

Relying upon *Montana*, 450 U.S. 544, the district court concluded that this action "involves an external relationship between the Tribe and non-members of the Tribe, the County. The Tribe's sovereignty concerning external relationships has been divested, and the Tribe is not free to determine independently the County's authority to tax fee patent land on the reservation." The district court further concluded that the Tribe could not assert jurisdiction under either of the two exceptions outlined in *Montana*.

[3] In *Montana*, the Supreme Court considered the power of an Indian tribe to regulate hunting and fishing by non- Indians on lands located within the Crow Reservation and owned in fee simple by non-Indians. The Court provided the following discussion of tribal sovereignty:

> [T]he Court [in *United States v. Wheeler*, 435 U.S.313 (1978)] was careful to note that, through their original incorporation

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(Indian tribe is necessary party to action seeking to enforce lease agreement signed by tribe); *see also Enterprise Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 893 (10th Cir. 1989) (Indian tribe is necessary party to action seeking to validate contract with tribe).

into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. The [Wheeler] Court distinguished between those inherent powers retained by the tribe and those divested:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 563-64 (citations and internal quotation marks omitted) (emphasis in original). The Court concluded:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted) (emphasis added); accord *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 425-28 (1989) (plurality opinion); *see also South Dakota v. Bourland*, 113 S. Ct. 2309, 2320 n.15 (1993) (quoting *Montana*, 450 U.S. at 564) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' ").

[4] The *Montana* Court then went on to discuss two exceptions to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The first exception recognizes that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (citations omitted). The second exception acknowledges a "tribe's

inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

A

Here, the district court rejected Pease's contention that the Tribe has jurisdiction under the first *Montana* exception on the ground that a consensual commercial relationship arose from the Crow Allotment Act of 1920 (which gave the state of Montana sections 16 and 36 of every range and township on the reservation). The district court concluded that the Crow Allotment Act "is a legislative directive from Congress and does not equate to a consensual commercial relationship." The district court also rejected Pease's assertion that tribal jurisdiction exists under the second *Montana* exception on the ground that the County's taxing activity affects the "political integrity, the economic security, or the health or welfare of the tribe." The court concluded that "while the state taxes affect the individual Pease, the taxes do not imperil the political integrity, economic security, or the health and welfare of the Crow Tribe."

B

[5] On appeal, Pease asserts that *Montana* does not apply to the County's action because *Montana* only imposed restriction on a tribe's jurisdiction over fee land owned by non- Indians. This contention is unpersuasive because the issue presented here is whether the tribal

court may assert jurisdiction over a non-Indian party (the County), and this court has called *Montana* "the leading case on tribal civil jurisdiction over non-Indians." *Shoshone-Bannock Tribes*, 905 F.2d at 1314; see also *A-1 Contractors v. Strate*, 76 F.3d 930, 937-38 (8th Cir. 1996) (en banc) (rejecting notion that *Montana* and its progeny are limited to cases involving fee lands owned by non-Indians), petition for cert. filed, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 95-1872).[5]

C

[6] Next, Pease contends that the district court erred by failing to recognize that post-*Montana* cases (e.g., *National Farmers Union* and *Iowa Mutual*) demonstrate that tribal adjudicatory jurisdiction over non-Indians is much broader than the tribal regulatory authority at issue in *Montana*.[6] We are not persuaded.

[7] Pease's assertion of a meaningful adjudicatory/regulatory distinction is unavailing, particularly in light of the Eighth Circuit's recent rejection of this argument

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[5]In A-1 Contractors, the court overturned tribal court jurisdiction in a tort action between non-Indians because the court could not find a consensual agreement under the first Montana exception, and because the "desire to assert and protect excessively claimed sovereignty" was not a sufficient tribal interest under the second exception. 76 F.3d at 940.

[6]The Crow Tribe also makes this argument in its amicus brief. The Tribe argues that the correct test, as set forth in National Farmers Union, "is whether tribal court jurisdiction has been divested by a specific treaty or statutory provision."

in a persuasive en banc opinion. *A-1 Contractors*, 76 F.3d at 938 ("[T]he distinction does not appear explicitly, or even implicitly, anywhere in the case law. *Montana* and the cases following *Montana* . . . never suggested that their reasoning is limited solely to regulatory matters."); *see also Brendale*, 492 U.S. at 430 ("The governing principle [of *Montana*] is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.").

In *Iowa Mutual*, the Court stated that civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. In *National Farmers Union*, the Court observed: "[T]he existence and extent of a tribal court's [civil subject-matter] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-56.

[8] In *A-1 Contractors*, the Eighth Circuit conceded that some of the language in *Iowa Mutual* and other cases "can be viewed in isolation to create a tension with *Montana*," but the court concluded that

> a careful reading of the particular language of those cases . . . indicates that they can and should be read together with *Montana*

> to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

A-1 Contractors, 76 F.3d at 938-39. The Eighth Circuit also stressed that *Iowa Mutual* and *National Farmers Union* are exhaustion cases that did not decide whether tribes had jurisdiction over nonmembers. *Id.* at 936; *see also Brendale,* 492 U.S. at 427 n.10.

We reject Pease's contention that *A-1 Contractors* is erroneous and in conflict with *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir.), *cert. denied*, 115 S. Ct. 485 (1994). It is true that the Eighth Circuit declined to follow Hinshaw "[t]o the extent that Hinshaw supports the . . . arguments that tribal courts have jurisdiction over a tort claim arising between two non- Indians on a highway running through an Indian reservation." *A-1 Contractors*, 76 F.3d at 939. However, *Hinshaw* is consistent with *Montana* and in no way supports the Tribe's adjudicatory/regulatory distinction; moreover, *Hinshaw* is clearly distinguishable from the case before

us. [7]

In *Hinshaw*, this court upheld tribal court jurisdiction in a tort action (wrongful death) brought by a tribal member whose son (a non-member of the tribe) was killed by an automobile driven by a non-Indian resident of the reservation. Citing *Montana*, the court first determined that the Tribes retained their inherent jurisdiction over the alleged tort; the court rested this determination on tribal ordinances and state court decisions, which explicitly provide that the Tribes have concurrent jurisdiction with the states over automobile accidents on public roads on the reservation. Hinshaw, 42 F.3d at 1180. Thus, the *Hinshaw* court implicitly concluded that state and tribal authorities coupled with the tortfeasor's specific contacts with the reservation created the requisite "tribal interest" under *Montana*. In contrast, the Crow Tribe does not enjoy specific authority to exercise jurisdiction over the propriety of a county's property tax scheme; in addition, unlike the non-Indian tortfeasor in Hinshaw, the non-Indian here neither resided on the reservation nor violated an enforceable tribal ordinance.

We also reject Pease's suggestion that *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), compels the

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[7]In fact, *Hinshaw* is also distinguishable from *A-1 Contractors*. Although the Eighth Circuit did not mention this distinction, the tribal court plaintiff in Hinshaw, unlike the tribal court plaintiff in *A-1 Contractors*, was a tribal member residing on the reservation. See *Hinshaw*, 42 F.3d at 1180.

conclusion that tribal courts may exercise jurisdiction over government entities in a wide variety of actions. In Plainbull, the United States brought suit (in its own right and on behalf of the Crow Tribe) against an Indian couple (the Plainbulls), alleging that they trespassed on tribal trust land and failed to comply with orders to pay annual grazing fees on the Crow reservation. Pursuant to 25 U.S.C. S 201, the United States brought the action against the Plainbulls in federal district court. Concluding that the action "essentially involves the enforcement of a tribal resolution against a tribal member," the district court granted the Plainbulls' motion to dismiss on abstention grounds. *Id.* at 725. On appeal, this court affirmed, holding that the district court's decision to abstain was not an abuse of discretion. *Id.* at 728 ("Because the Plainbulls [members of the Crow Tribe] grazed their cattle on tribal land without obtaining a tribal permit, the Government should have filed in the tribal court."). In short, this court in *Plainbull* relied upon the exhaustion doctrine (*National Farmers Union* and *Iowa Mutual*), and had no occasion to discuss the *Montana* test.

D

Finally, assuming arguendo that *Montana* controls, Pease argues that the district court erred in failing to conclude that Pease's action qualified under both factors. We disagree.

[9] First, we are not persuaded by Pease's contention that the Crow Allotment Act of 1920 gave rise to a commercial agreement that enables the Tribe to qualify

for jurisdiction under the first *Montana* exception. Pease stresses that the Allotment Act gave Montana sections 16 and 36 of every range and township on the reservation upon the condition that Montana would allow Crow children to attend state public schools. This contention fails because the Allotment Act does not constitute a consensual commercial agreement; in fact, "allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Montana*, 450 U.S. at 559-560 n.9 (citations omitted). As the district court correctly concluded, the Allotment Act is "a legislative directive from Congress."

[10] Second, we reject Pease's argument that the Tribe has jurisdiction under the second *Montana* exception. Although he concedes that this action directly concerns only his particular property, he argues that the overall impact of the loss of land due to potential foreclosures could be devastating to the Tribe's land holdings and political integrity. This contention fails to establish a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole." *South Dakota v. Bourland,* 39 F.3d 868, 870 (8th Cir. 1994) (emphasis added); *see Montana*, 450 U.S. at 566. As the Supreme Court has stated, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale*, 492 U.S. at 431. Pease's speculation concerning future foreclosures is

insufficient to constitute the requisite imperilment.[8]

IV

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the County.

AFFIRMED.

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[8]Because we affirm the district court's holding on the jurisdictional issue, we need not reach the County's sovereign immunity argument.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed October 25, 1996]

WRIGHT, BEEZER AND O'SCANNLAIN, Circuit Judges:

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BILLINGS DIVISION

No. CV 94-131-BLG-JDS

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff,
v.
CARL PEASE,
Defendant.

[Filed July 26, 1995]

MEMORANDUM AND ORDER

SHANSTROM, District Judge

Pending before the Court are cross-motions for summary judgment between plaintiff, Yellowstone County (County), and defendant, Carl Pease (Pease).

BACKGROUND

Pease is member of the Crow Tribe of Indians (Tribe) and owns property in fee located within the boundaries of the Crow Reservation. Pease has failed to pay his state property taxes from 1987 to the present. In July 1991, Pease filed an action in Crow Tribal Court seeking to enjoin the County from imposing state property taxes against his land. While in Tribal Court, the parties

agreed to stay the matter pending the decision of the United States Supreme Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S.Ct. 683 (1992). That decision held the states could impose an ad valorem property tax on fee land that had been allotted under the General Allotment Act. The Tribal Court lifted the stay and, upon summary judgment motions, held the Montana state constitution barred the County from imposing taxes on Pease's land. The County appealed that judgment to the Crow Court of Appeals, which held the Crow tribal courts had jurisdiction over the case and held the County could not tax Pease's land because the land was allotted under the Crow Allotment Act, not the General Allotment Act.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Cord. v. Catrett*, 477 U.S. 317, 322 (1986). The parties agree to the underlying facts and argue the interpretation of law.

DISCUSSION

In its complaint before this Court, the County raised two issues. First, whether the tribal courts had subject matter jurisdiction, and second, whether the County has authority to tax Pease's property. In the present motion for summary judgment, the County seeks resolution of only the first issue concerning the jurisdiction of the

tribal courts.

I. Tribal Court jurisdiction

The leading United States Supreme Court case on tribal court jurisdiction over non-Indians is *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). The Supreme Court stated:

> (T)hrough their original incorporation into the United States as well as through specific treaties and statues, the Indian tribes have lost many of the attributes of sovereignty . . .
>
> The areas in wh ch such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relation among members of a tribe*. Thus they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.
>
> Thus in addition to the power to punish tribal offenders, the Indian tribes retain

> their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise or tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.
>
> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 563-66 (emphasis in original) (citations omitted). From the foregoing, the law states there has been a divestiture of tribal sovereignty in areas

involving relations between a tribe and non-members of the tribe. *Id*. at 564. Tribes do not have independent freedom to determine their external relations. *Id*. The *Montana* decision, however, recognizes two exceptions. First, tribes retain power to exercise some forms of civil jurisdiction when non-members enter consensual relationships with the tribe or its members. *Id*. at 565. Second, tribes retain civil authority when a non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id*. at 566.

This case involves an external relationship between the Tribe and non-members of the Tribe, the County. The Tribe's sovereignty concerning external relationships has been divested, and the Tribe is not free to determine independently the County's authority to tax fee patent land on the reservation.

Pease argues the Tribe has jurisdiction under the first *Montana* exception in that a consensual commercial relationship arises from the Crow Allotment Act of 1920, which gave the state of Montana sections 16 and 36 of every range and township on the reservation. Apparently the land was given to the state as compensation for the lack of a tax base to support state schools which would be required to educate Crow children.

The Crow Allotment Act of 1920 does not form a consensual commercial relationship between the parties. That Act is a legislative directive from Congress and does not equate to a consensual commercial relationship.

Pease argues the Tribe has jurisdiction under the

second *Montana* exception because the County's action effects the "political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The proper focus of this test is the effect upon the Tribe as a whole, not the effect upon individual tribal members. *See, South Dakota v. Bourland*, 39 F.3d 868, 870 and n.5 (8th Cir.1994); *Lewis County Idaho v. John Allen*, Civil No. 93-0382-N-HLR (D.Idaho 1994). Furthermore, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the U.S. Supreme Court discussed the second *Montana* exception, and noted not all conduct that threatens or effects a tribe will trigger tribal authority. Rather, the impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. *Id.* at 431 (emphasis added).

Pease argues that while the loss of one or two allotments may seem insignificant, the cumulative loss of land through the allotment process has had a devastating economic impact on the tribes. Pease's argument goes too far. The allotment process was a complex U.S. government policy carried out by various pieces of legislation including the Crow Allotment Act of 1920. The Court finds that while the state taxes affect the individual Pease, the taxes do not imperil the political integrity, economic security, or the health and welfare of the Crow Tribe.

Furthermore, the issue of whether a state or county can

tax land on a reservation has been extensively litigated in federal court. *See, County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S.Ct. 683 (1992); *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir.1993); *Goudy v. Meath*, 203 U.S. 146 (1906). Considering the extensive history of federal litigation on the merits of this case, it is incomprehensible to now conclude the tribal courts have jurisdiction.

Pease argues the County has failed to exhaust tribal remedies. Since the Crow Court of Appeals ruled on its jurisdiction, this Court finds the County has exhausted their tribal remedies.

Pease argues the Crow Tribe is an indispensable party because if the Tribe is not a party, then it will not be bound by a judgment of this court. The Crow Tribe is not an indispensable party, and the Tribe would be bound by a judgment of this Court.

II. The merits - can the County tax Pease's land?

In the cross-motions for summary judgment, the parties have not addressed the merits, namely, does the County have the authority to tax Pease's land. Having determined the federal courts are the proper forum to determine the tax issue, the Court will give Pease 60 days from the date of this order to bring a summary judgment motion on the merits. If Pease chooses not to move for summary judgment, the Court will dismiss this case with prejudice with a holding the tribal courts do not have jurisdiction over the subject matter, thus vacating the tribal courts' judgments.

Accordingly,

IT IS ORDERED

1. The County's motion for summary judgment is granted to the extent that the tribal courts do not have jurisdiction over the subject matter in this case.

2. Pease's motion for summary judgment is denied.

3. Pease has 60 days from the making of this order to move for summary judgment on the question of whether the County can tax Pease's land. Failure to move for summary judgment will prompt the Court to enter judgment with prejudice in favor of the County, thus vacating the tribal courts' judgments.

The Clerk of Court shall forthwith notify the parties of the making of this order.

APPENDIX C

CROW TRIBAL COURT OF APPEALS
In and for the Crow Tribe of Indians
Crow Agency, Montana 59022

CARL PEASE,
Plaintiff/Appellee.

vs.

YELLOWSTONE COUNTY,
Defendant/Appellant

APPELLATE OPINION

[Filed June 24, 1994]

Before St. Clair, Gardipee, and Lozar, Special Crow Tribal Appeals Judges

Appellant, Yellowstone County, appealed the judgment of the Crow Tribal Court dated March 25, 1994, holding that Yellowstone County is without authority to tax real property owned by Carl Pease, a member of the Crow Tribe of Indians located on the Crow Indian Reservation,

more particularly described as,

E 1/2 NW 1/4 Section 24, T1S, R26E,
M.P.M., Yellowstone County, Montana.

Yellowstone County contends that fee patented reservation land is taxable by Yellowstone County once restraints against alienation are removed. We disagree.

In July 1991 an action was filed in the Crow Tribal Court by Carl Pease, present owner of the land in question. He obtained it from his father Carl Pease, Jr., who received a fee patent July 26, 1923. Carl Pease failed to pay his ad valorem taxes on the land from 1987 to present. Yellowstone County attempted to issue a tax deed, but this action was filed and the tribal court enjoined Yellowstone County from receiving a tax deed to the property. Yellowstone County appealed the injunction and also raised the lack of subject matter jurisdiction for the first time.

The trial court in this case on stipulated facts concluded that the land owned by Carl Pease is not taxable by Yellowstone County because no record shows that Carl Pease, Jr. ever requested a fee patent and that states so not have the right to tax land to which a fee patent was issued without the consent of the beneficial owner. In addition, the court concluded that the land is not taxable because the state has not acted by specific legislation to remove restrictions in its enabling legislation to accept tax jurisdiction.

Appellant claims, for the first tine on appeal, that the Crow Tribal Court does not have jurisdiction over this matter and cites *National Farmers Union v. Crow Tribe,*

471 U.S. 845, 852 (1988), for the proposition that a careful examination must be made as to the extent tribal sovereignty has been altered, divested or diminished. It asserts that this requires the Crow Tribal Court to consider the examination of subject matter jurisdiction over cases involving non-Indians in the light of its ability to regulate the underlying transaction. It goes on to argue that *National Farmers Union* read together with *Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9, 16 (1987) implies that tribal law may not extend to situations involving non-Indians. It states in its Reply Brief at page 4:

> The Tribal Court does not have the ability to decide what land within the borders of the State of Montana should be subject to tax. State taxation law should be interpreted by other courts.

Yellowstone County assumes, without presenting any facts to support it, the conclusion that the Crow Tribal Court simply because it is a tribal court, does not have the ability to decide what land on the Crow Reservation should or should not be taxable but that this should be interpreted by other courts. This argument is without merit. A careful examination of the extent that tribal sovereignty has been altered divested or diminished as to the issue of state taxation on land located within the Crow Indian Reservation reveals that no diminishment, divestiture or alteration is alleged to have occurred. To the contrary, the Crow Tribal Code, Title III, Ch. 2, Sec. 20, explicitly provides for subject matter jurisdiction over this kind of case.

The crux of appellant's argument involves three steps. First, a state cannot tax reservation land unless Congress authorized it and has made its intention unmistakenly clear, *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). Second, *Yakima Indian Nation v. Yakima County*, 112 S.Ct. 683 (1992), found such clarity in the General Allotment Act, 24 Stat. 388, sections on alienability and a proviso in the Burke Act of 1906, 34 Stat. 182. Third, *Yakima Indian Nation, Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir.1993), and *Blackfeet Tribe v. Robinson*, No. CV-89-100 G.F. (1994), hold that alienable land will be taxable regardless of how the parcel was allotted. Thus following this logic, land allotted even under the Crow Allotment Act, 41 Stat. 751, Act of June 4, 1920, is taxable by Yellowstone County.

This interpretation misses the point that there must be a finding of unmistaken clear intent of Congress to allow taxation on these particular lands, lands which were not patented under the General Allotment Act as in *Yakima Indian Nation*, nor under treaty as in *Lummi*, nor under townsite laws as in *Blackfeet Tribe*. There is an appealing simplicity to the proposition that alienable land is taxable land. However, federal Indian law is not simple, especially where many tribes have legislation that pertains only to that tribe, such as the Crow Allotment Act here.

We conclude that allotments made under the Crow Allotment Act are not governed by the General Allotment

Act. Further, Congress has not made its intention unmistakenly clear that the land should be taxed under the Crow Allotment Act of 1920. Therefore, no error of law exists because this case is distinguishable from *Yakima Indian Nation* where the United States Supreme Court ruled that Congress' intent was unmistakenly clear that land patented under the General Allotment Act should be taxed. This land does not fall under a treaty as in *Lummi*, nor townsite laws as in *Blackfeet Tribe*.

Utilizing a strained interpretation to read a clear manifestation of Congressional intent to remove the restrictions on real property taxation, the United States Supreme Court in *Yakima Indian Nation*, implied intent from Section 5 of the General Allotment Act read along with the proviso in the Burke Act of 1906. This analysis was not made in *Lummi* and *Blackfeet Tribe*; these cases merely extend the reasoning that alienability equals taxability. This overreaching uses a blanket approach toward all tribes and does not scrutinize the Crow Allotment Act. in order to conclude that Congress clearly intended to remove the tax restrictions on this particular tract. What does appellant point to to indicate a manifestation of clear Congressional intent? What sections of the Crow Allotment Act indicate this and if they do were they complied with? Appellant believes that these cases hold that alienability to mean taxability on the Crow Indian Reservation. from an implication of intent made in Section 5 of the General Allotment Act of 1887 and a proviso in the Burke Act of 1906, and it doesn't matter how the land became patented.

To rule in Appellant's favor would require this court to ignore a tradition of independence that has historically existed between the Crow people and the United States Government. It would also require ignoring a policy of self determination observed by Congress and the President since 1968 and ignoring the amending of P.L. 280 to require consent of the Indian Tribes prior to any assuming of state jurisdiction. It would require applying the principles of assimilation repudiated by the policy of self determination. and the repeal of the allotment process that occurred in 1934.

The Ninth Circuit Court of Appeals in *Lummi* was a divided court and the dissent indicated that a clear manifestation of intent should not be implied in Indian law as appellant is asking this court to do. It stated:

> We need to find unmistakenly clear intent of Congress to allow taxation on these particular lands, lands which do not come under the GAA [General Allotment Act]. 5 F.3d 1355 at 1360.

In *Blackfeet Tribe*, the Federal District Court found alienability of allotments located in townsites of the state located on the Blackfeet Indian Reservation. Land located in a townsite is in a much different situation than land located on a portion of a reservation never under state authority as a townsite is. It can be argued that allotments in a townsite should not be restricted as to taxability just because of being located in a town that is incorporated as part of the State of Montana. We hold that absent an explicit Congressional manifestation of

intent to allow Yellowstone County to tax land within the Crow Indian Reservation, Yellowstone County lacks authority to tax this land and we affirm the ruling of the court below.

AFFIRMED

Judge Lozar dissents from this decision and files a separate opinion.

APPENDIX E

CROW TRIBAL COURT
IN AND FOR THE CROW TRIBE OF INDIANS
CROW AGENCY, MONTANA 59022

Civil No. 91-209

CARL PEASE,
Plaintiff/Appellee.

vs.

YELLOWSTONE COUNTY,
Defendant/Appellant

[filed March 25, 1994]

JUDGMENT AND MEMORANDUM

ARNESON, Tribal Judge

This matter was submitted on Stipulated Facts and Cross Motion for Summary Judgment. At issue is the ability of Yellowstone County to tax allotted patent land owned by a member of the Crow Tribe and located on the Crow Reservation. For reasons discussed below:

IT IS ORDERED ADJUDGED AND DECREED that Yellowstone County is without authority to tax the real property owned by Carl Pease more particularly

described as,

E1/2 NW1/4, Section 24, T 1S, R 26E, M.P.M.
Yellowstone County, Montana

It is further ordered that yellowstone County is enjoined from issuing a tax deed or tax sale certificate to the above described land.

MEMORANDUM

Plaintiff forwards two (2) reasons to find that his land is not subject to state taxation. First, he contends that federal law precludes taxation. Second, he maintains there are State statutory barriers.

I. The Federal Issue

The plaintiff puts forth an argument that almost persuades this court the land is not taxable by the state. In 1882 this Tribe negotiated a land cession with the United States. As part of the compensation for the ceded lands, the United States agreed to allot lands to individual members. These allotments were to be nontaxable for a minimum of 25 years and until such time thereafter until the President saw fit to remove the restriction. A tax exemption is a valuable property right and was part of the basis of the bargain. The land in question was patented directly into fee when allotted and was never tax exempt. While an individual may waive the benefits of tax exemption, it has been stipulated here that George Pease Jr. never requested a fee patent. This court is tempted to rule that his land is not taxable since the

president has never removed the restriction on taxation.[1] However, the court does not feel comfortable distinguishing *Lummi Tribe V. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), despite the fact that the Ninth Circuit did not address the contractual property right in that case.

II. The State Law Issue

The Montana Constitution disclaims all jurisdiction over Indian owned lands until it is given consent to exercise jurisdiction by the United States and the jurisdiction is accepted by the people of Montana (Art. I of Montana Constitution.) The consent of both sovereigns are needed.

The United States has consented to the state's exercise of taxing jurisdiction. *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, ____ U.S. ____, 116 L.Ed.2d 687 (1992); *Lummi Tribe V. Whatcom*

---

[1]The court is aware of intervening allotment acts, specifically the General Allotment Act, 34 Stat. 182, and Crow Allotment Act of 1920, 41 Stat. 751.The court would read these acts together to find no repeal by implication of the tax exempt status. The court also notes that to the extent that the tax exempt status was a contractual property right, that right could not be taken by legislation without just compensation.

County, 5 F.3d 1355 (9th Cir. 1993).[2]

The consent of the second sovereign, Montana's consent, has not been met. The county failed to cite any statute or other authority showing that Montana has accepted jurisdiction over fee lands on an Indian Reservation.

Under the circumstances, plaintiff's land is not subject to state taxation until the state acts to accept such jurisdiction.

The court is aware that the state has asserted taxing authority since the land was first patented in fee. However, acting 70 years without authority does not confer a future right to act without authority.

In one way this court feel uncomfortable basing a decision on state law. Such a question should be decided by a state court.

While the State Court has upheld state taxation challenged under federal law authorities, has never addressed the need for the consent of the people of Montana.

In another way, this court believes a decision on the state law grounds is the most appropriate. The state can attempt to make the land taxable by passing

---

[2]While the court is uncomfortable holding and does not hold that *Lummi* denies property rights granted by specific legislation, it is clear that absent specific legislation, the consent of the United 'States can be inferred from making land alienable.

appropriate legislation. This decision leaves that option open while a decision based on the federal issue would not. The court feels better leaving that option open, realizing that the State and Tribe might well negotiate a taxation compact that would prevent future litigation on the issue.

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed October 25, 1996]

WRIGHT, BEEZER AND O'SCANNLAIN, Circuit Judges:

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

(2)

No. 96-1204

In The

Supreme Court of the United States

October Term, 1996

CARL PEASE,

Petitioner,

v.

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a tribal court have jurisdiction over a nonconsenting political subdivision of a State for the purpose of determining whether a state tax statute is preempted by federal law and enjoining its enforcement?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Yellowstone County, Montana ("County") hereby responds to the petition for a writ of certiorari filed herein.

STATEMENT OF THE CASE

In July 1991 Petitioner Carl Pease ("Pease") filed an action in the Crow Tribal Court seeking to enjoin the County from imposing state property taxes on his real property located within the exterior boundaries of the Crow Indian Reservation. Pease is a member of the Crow Tribe, and the property in question was allotted and patented in fee under the Crow Allotment Act of 1920 (41 Stat. 750) to Pease's father, also a Crow tribal member.[1]

The Crow Tribal Court issued a judgment and memorandum in March 1994 determining that the County lacked authority to impose the challenged taxes and enjoining it from issuing a tax deed or tax sale certificate. The court reasoned that, while *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251

[1] Pease alleges that his father "had been issued a fee patent despite the fact that he had never requested the land be removed from trust." (Pet. at 2.) Apart from being immaterial, this allegation is unsupported by the record. The only statement in the record relating to the manner in which the subject parcel came into fee ownership was a stipulation filed with the tribal court. That stipulation states no more than that ***"there is no record that*** [Pease's father] ever requested a fee patent to this land." (Opp. App. at 2) (emphasis added).

(1992), and *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), compelled the conclusion that in 25 U.S.C. § 349 Congress had removed any restriction against state taxation, the disclaimer provision in article I of the Montana Constitution established that Montana has never "accepted jurisdiction over fee lands on an Indian reservation" and that, "[u]nder the circumstances, Plaintiff's land is not subject to state taxation until the state acts to accept such jurisdiction." (Pet. App. at 38a.) The County appealed, and in June 1994 the Crow Tribal Court of Appeals affirmed on different grounds.

The Tribal Court of Appeals first rejected the County's contention that the tribal courts lacked subject matter jurisdiction over Pease's claim because "[a] careful examination of the extent that tribal sovereignty has been altered, divested or diminished as to the issue of the exercise of tribal court jurisdiction over an issue of state taxation of land located within the Crow Indian Reservation reveals no diminishment, divestiture or alteration is alleged to have occurred." (Pet. App. at 30a.) It then held that the Crow Allotment Act did not evince a clear congressional intent to remove the traditional prohibition against state taxation of tribal lands. (Pet. App. at 32a.) The Tribal Court of Appeals distinguished *County of Yakima* on the basis that "allotments made under the Crow Allotment Act are not governed by the General Allotment Act" and on the basis that Pease's claim did not involve townsites, which are "in a much different situation than land located on a portion of a reservation never under state authority as a townsite is." (Pet. App. at 31a-32a.) Unable to distinguish *Lummi*, the Tribal Court

of Appeals simply adopted the reasoning of that decision's dissent. (Pet. App. at 33a.)

The complaint in this matter requested the district court to rule that the tribal court's judgment was void because the Crow Tribal Courts lacked adjudicatory jurisdiction over the County.[2] In July 1995 the district court granted the County's summary judgment motion, holding in relevant part that the tribal court lacked adjudicatory authority over the County. (Pet. App. at 26a.) The court of appeals similarly rejected Pease's argument that there is a "meaningful . . . distinction" between tribal adjudicatory and regulatory authority (Pet. App. at 13a-14a, *citing A-1 Contractors v. Strate*, 76 F.3d 930, 938 (8th Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 37 (1996) (No. 95-1872)), and went on to hold that the tribal court lacked jurisdiction over the County under either of the "exceptions" identified in *Montana v. United States*, 450 U.S. 544, 565-66 (1981). As to the first – or consent – exception, it concluded that the Crow Allotment Act "did not constitute a consensual commercial agreement." (Pet. App. at 18a.) With respect to the second exception the court explained that "Pease's speculation concerning

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[2] The County also initially asked the district court to rule on the merits of the tribal court's determination that the involved state property taxes were preempted by federal law. It later withdrew that request based on its belief that Pease's defenses to his tax liability were more properly resolved in state administrative and judicial proceedings and because, as a usual matter, federal district courts lack jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

future foreclosures [of tribal member-owned land] is insufficient to constitute the requisite imperilment." (Pet. App. at 18a-19a.) Because it had held for the County on this basis, the court of appeals declined to address the County's sovereign immunity argument. (Pet. App. at 19a, n.8.)[3]

SUMMARY OF THE ARGUMENT

Pease's suggestion that the Court "grant, vacate and remand" should be rejected because *Strate* is not necessarily dispositive of this case. While it is true that the Ninth Circuit relied on the Eighth Circuit's decision in *Strate*, the County possesses another meritorious argument which the Ninth Circuit did not address and which is sufficient by itself to sustain the decision below without regard to the questions presented in the petition or in *Strate*.

The County, which with respect to the matters at issue in this case is acting as an arm of the State of Montana, possesses and is entitled to assert the latter's common law sovereign immunity as a defense to an action brought against it in a tribal court. The State's common law immunity has a well established basis in the law and, as between the State and an Indian tribe, has not

[3] Pease raised two defenses below that were rejected by the district court and the court of appeals: (1) the "jurisdictional issue" had not been properly exhausted, and (2) the tribal court was an indispensable party. Pease has not sought review of either question.

been abrogated by the incorporation of either into the federal union.

While the Court in *Nevada v. Hall*, 440 U.S. 410 (1979), held that there is no rule implicit in the constitutional structure which would protect one State from unconsented suit in the courts of another State, the reasoning of that decision supports the conclusion that there *is* such a constitutionally based rule in a case such as this. If tribal courts are free to independently determine whether to honor a State's immunity, it would threaten to frustrate the federal government's laws and policies as well as the States' sovereign functions.

REASONS FOR DENYING THE WRIT

Pease argues that, since the Ninth Circuit relied on the Eighth Circuit's decision in *Strate*, and since this Court granted certiorari to review the same, a "grant, vacate and remand" order ("GVR") is appropriate regardless of which way *Strate* comes out. Pease suggests that if this Court affirms the Eighth Circuit's decision, he be allowed another opportunity to distinguish this case from *Strate*. (Pet. at 4.) If this Court reverses the Eighth Circuit's decision, Pease contends he should be allowed an opportunity to "change the position taken by the panel below." (Pet. at 5.)

A GVR is appropriate only when there are intervening circumstances that would make a difference in the outcome of the case. *E.g., Lawrence v. Chater*, 116 S. Ct. 604, 607 (1996) (per curiam). Even assuming arguendo that this Court holds in favor of tribal court jurisdiction

in *Strate*, the County possesses an additional defense to tribal court jurisdiction not addressed by the court of appeals: common law sovereign immunity. That immunity has already been recognized by other lower courts (*see e.g., Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed* (9th Cir. July 18, 1996) (No. 96-35766)), and is sufficient to sustain the decision below independent of the issues which Pease raises in his petition or which are likely to be addressed in *Strate*.[4]

A. States and Their Political Subdivisions Possess Common Law Sovereign Immunity From Suit in the Tribal Courts.

At the time of the Constitution's ratification the States enjoyed a broad common law immunity from suit. As recently as last term, this Court thus explained that *Hans v. Louisiana*, 134 U.S. 1 (1890), "found its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations' [which held that] sovereign immunity 'is the general sense and the general practice of mankind.' " *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1130 (1996); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (explaining that Indian tribes' sovereign immunity flows from the same "common law immunity from suit traditionally enjoyed

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[4] As the prevailing party, the County is entitled to defend the court of appeals' judgment on any ground the latter had before it, whether or not it was relied upon, rejected, or ignored, as long as that ground is not inconsistent with the judgment. *E.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).

by sovereign powers"); *In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992), *cert. denied sub nom. Richardson v. Mount Adams Furniture Co.*, 510 U.S. 1039 (1994) (same). A State's interest in immunity "encompasses not merely whether [it] may be sued, but *where* it may be sued" (*Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis added)), and at common law extended to a State's political subdivisions "when acting in [a] 'governmental' or 'public' capacity." *Owen v. City of Independence*, 445 U.S. 622, 645 (1980).[5] "Sovereign immunity exists to preserve the resources of the government and to protect [it] from undue influence by the judiciary." *Gilham*, 932 F. Supp. at 1219, *citing Edelman v. Jordan*, 415 U.S. 651 (1974).

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[5] Even if Eleventh Amendment principles are used to determine whether the County is entitled to assert the State's immunity it is clear that, at least for present purposes, it would qualify as an "arm of the state." *See generally Regents v. Doe*, No. 95-1694, 1997 WL 65561 (U.S. Feb. 19, 1997). The property tax at issue is established under state law. *See* Mont. Code Ann. § 15-10-101 (1995). While the County is authorized to set mill levies for one portion of the tax, the bulk of it is set by the Montana Legislature and other local governmental entities. In collecting and disbursing the property tax the County is acting as an agent of the State (*see id.* §§ 15-16-101 to -803 (1995)), and its amenability to suit under state law is specifically proscribed. *Id.* §§ 15-1-405 and -406 (declaratory and injunctive relief against tax collection); *id.* § 15-15-101 (administrative appeal of tax assessment). Finally, any loss of tax revenue due to an inability to enforce the tax impacts the State and other governmental entities as much as it does the County. The "essential nature and effect" (*Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 576 (1946)) of the action at issue here is that of the State.

As the lower court in *Gilham* also noted, while the Eleventh Amendment does not textually address the question presented in this case, it is nevertheless relevant because of the principles animating its adoption. 932 F. Supp. at 1219-20. This Court has been quite clear in its view that the States' common law sovereign immunity was confirmed – not created – through adoption of the Eleventh Amendment. That amendment

> since *Hans* . . . [has been] understood . . . to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991); *accord Seminole*, 116 S. Ct. at 1130; *Pennhurst*, 465 U.S. at 98.

It defies logic to suggest that, notwithstanding the States' jealous regard for their freedom from suit in federal court, either the "plan of the convention" or the contemplation of the Framers left room for Indian tribes, as "domestic dependent nations," to exercise a form of jurisdiction their guardian could not. The quixotic nature of a contrary claim is exemplified best in this Court's rejection of the notion "that the States had waived their [Eleventh Amendment] immunity against Indian tribes when they adopted the Constitution" (*Blatchford*, 501 U.S. at 781) in the same fashion as they had with respect to one another:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of the concession. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suit by States, . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender ***the tribes'*** immunity, for the benefit of the ***States***, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 782 (citation omitted). By necessary implication, if the States did not waive their immunity against tribes for Eleventh Amendment purposes, they did not do so for other purposes. *Gilham*, 932 F. Supp. at 1222 (noting that it made no sense to conclude "that the states would surrender their immunity to Indian tribes without a mutual concession from the tribes").

B. An Immunity Rule Must Be Considered Implicit Within the Constitutional Structure in Order to Protect Congress's Plenary Powers, and the State's Sovereign Interests, From Being Frustrated by Actions Brought in Tribal Courts.

Beyond the question whether States possess common law immunity from suit in tribal courts is whether the latter are bound under the Constitution to respect the same. This Court's analysis of the similar question presented in *Nevada v. Hall*, 440 U.S. 410 (1979), points ineluctably to the conclusion that tribal courts are constitutionally disabled from independently determining whether to respect or ignore a State's immunity.

Nevada v. Hall involved the question whether the constitution imposed a limitation on the ability of California courts to entertain an action alleging negligence by an employee of the State of Nevada while operating a motor vehicle in California. A six-member majority of the Court rejected Nevada's main contention that California was obligated under the Full Faith and Credit Clause to recognize limits imposed under Nevada law with respect to claims of this nature. *Id.* at 424. With respect to Nevada's alternate argument that the constitutional structure itself required such a limitation, the Court concluded that the Tenth Amendment militated against finding that "unstated limitations on state power were intended by the Framers." *Id.* at 425.

In so holding the Court was careful to point out that "California's exercise of jurisdiction ***in this case*** poses no substantial threat to our constitutional system of cooperative federalism," since "[s]uits involving traffic accidents outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." *Id.* at 424, n.24 (emphasis added). The Court thus had "no occasion . . . to consider whether different state policies, either of California or Nevada, might require a different analysis or a different result." *Id.*

Were Indian tribes States, *Nevada v. Hall* would arguably be controlling. They are not. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). Because of that their inherent sovereignty has been presumptively limited to matters essential to protecting tribal self-government or regulating internal matters among members. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality

op.). More important for present purposes, tribes cannot lay claim to a status coequal with that of States: While they have a form of sovereignty, it differs qualitatively from that underlying the Court's analysis in *Nevada v. Hall*.

The scope of a State's common law immunity from suit in tribal court, and the latter's power to independently determine the same, instead must be resolved against the unique constitutional and historical considerations attendant tribal sovereignty. In this regard, then-Justice Rehnquist's dissent in *Nevada v. Hall* is significant because, like his majority opinion in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), issued a year before, it emphasized the need to resolve the adjudicatory jurisdiction issue with careful attention to the historical backdrop against which the constitution was adopted and the need to be "sensitive to the constitutional plan and avoid a result that destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries." 440 U.S. at 441.

1. Tribal Court Jurisdiction Over States Threatens to Frustrate the Constitutional Structure for Regulating Indian Affairs.

Under the Articles of Confederation the federal government was given "the sole and exclusive right and power of . . . regulating the trade, and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated." Arts. Confed'n art. IX, ¶ 4, cl. 3. However, as Chief Justice Marshall

observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), "[t]he ambiguous phrases which follow the grant of power to the United States[] were so construed by the States of North Carolina and Georgia as to annul the power itself."

As a result of this "unsettled construction of the confederation," the 1787 Constitutional Convention "omitted those qualifications which embarrassed the exercise [of Continental Congress's power over Indian affairs] as granted in the confederation." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 19 (1831). The modification reflected the position advocated by James Madison, who argued that the problems inhering in the Articles could only be remedied by centralizing the power to deal with Indian tribes in the central government:

> The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. . . . And how the trade with Indians, though not members of a State, and yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case where the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with a compleat sovereignty in the States; to

> subvert a mathematical axiom, by taking away a part and letting a whole remain.

The Federalist No. 42, at 284-85 (James Madison) (Jacob E. Cooke ed., 1961). The "agreement within the convention that Indian affairs should be left in the hands of the federal government" (Francis Paul Prucha, *American Indian Treaties* 69 (1994)) thus gave rise to the Indian Commerce Clause, which was intended to divest States of "virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe,* 116 S. Ct. at 1126; *see also Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 234 (1985) ("[w]ith adoption of the Constitution, Indian relations became the exclusive province of federal law").

Underlying this transfer of power from the States to the federal government was the belief that Indian affairs did not admit readily to individual state control. While not completely foreclosed (*California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214-16 (1987)), state power over Indian tribes and their instrumentalities was thus severely limited. This transfer of power, however, had as its reciprocal Congress's plenary power over tribes. *E.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989); *Washington v. Confederated Bands & Tribes of Yakima Nation,* 439 U.S. 463, 501 (1979). Given the history and purpose of the Indian Commerce Clause it is simply inconceivable to conclude that the Framers envisioned – as being compatible with the "constitutional plan" – that Indian tribes would retain any authority or jurisdiction

over States, or that tribal courts would possess jurisdiction over States greater than that of the federal courts themselves.[6]

This case is a good illustration of how tribal court jurisdiction may frustrate congressional policy. In *County of Yakima* this Court concluded that Congress had intended in the General Allotment Act to remove restrictions on State taxation of Indian allotments which were alienable. 502 U.S. at 264. In *Lummi* the Ninth Circuit Court of Appeals extended that reasoning to all alienable lands regardless of how they were patented. 5 F.3d at 1358. Characterizing this Court's reasoning as "strained" (Pet. App. at 32a) and the Ninth Circuit's decision as "overreaching" (Pet. App. at 32a), the Crow Court of Appeals held that neither of those cases applied on the Crow Reservation (Pet. App. at 32a-33a).

Given that there is no recourse from the tribal court's mandate on anything other than jurisdictional questions (*see Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)), if tribal court jurisdiction is found to exist here it would

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[6] As this Court has observed, the Framers simply did not contemplate the types of tribal powers asserted here. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 10, 17 (1987) ("[t]ribal courts in the Anglo-American mold were virtually unknown in 178[illegible] when Congress first authorized diversity jurisdiction"); *Oliphant*, 435 U.S. at 197 ("until the middle of this century, few tribes maintained any semblance of a formal court system"); *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (Framers simply did not have tribes "in view" when extending federal court jurisdiction to controversies between States or citizens thereof and foreign states, citizens or subjects).

appear that federal laws – and this Court's decisions – may be subject to differing final interpretations on, off, and among Indian reservations. Such a result would frustrate Congress's and this Court's efforts to ensure consistency and uniformity in federal law, would create the specter of forum shopping, and would aggravate inter-jurisdictional conflicts.

2. Tribal Court Jurisdiction Over States Is Without Historical Precedent and Threatens to Frustrate State Sovereign Interests.

The historical backdrop underlying the adoption of the Eleventh Amendment and the Indian Commerce Clause make the Court's analysis in *Oliphant* and *Duro v. Reina*, 495 U.S. 676 (1990), particularly apposite. In those cases the Court held that non-Indians and Indian non-members are not subject to tribal criminal jurisdiction. The Court relied in part on the absence of historical precedent for extending tribal criminal jurisdiction over nonmembers. *Oliphant*, 435 U.S. at 197-206; *Duro*, 495 U.S. at 690-93. The same lack of precedent exists with respect to tribal jurisdiction over States – a vacuum easily explained by the traditional immunity of States from suit in any court without their consent and the notion that it was not tribes, but Congress, which was vested with the power to regulate state activity in Indian country.

Beyond a lack of historical pedigree for the result sought by Pease, however, is another similarity with *Oliphant* and *Duro*: the incongruity of recognizing tribal authority whose scope is unrestrained by the constitution. The *Duro* Court thus stressed the conclusion reached

in *Oliphant* that the "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." 495 U.S. at 693. It noted further the differences between tribal adjudicatory forums and state or federal ones, including their typical subordination to the political branch, possible reliance on "unspoken practices and norms," and the inapplicability of the Bill of Rights. *Id.* The last of these differences was the most significant because "[o]ur cases suggest constitutional limitations on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.*

While the specific Bill of Rights considerations at issue in *Oliphant* and *Duro* are not relevant here, the Tenth Amendment counsels a similar bright-line rule insofar as tribes attempt to regulate state activities in Indian country. It beggars credulity to conclude that tribes have comparable, much less greater, powers vis-á-vis the States than their sovereign – especially in light of a constitutional plan under which that sovereign's own powers derive from the States' agreement to divest themselves of authority for purposes of forming a national government. *See, e.g., New York v. United States,* 505 U.S. 144, 162 (1992) ("[t]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instructions"); *Nevada v. Hall,* 440 U.S. at 434 (Rehnquist, J., dissenting) (observing that *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), invalidated the States' right to tax the federal

government even absent an express constitutional prohibition because "the power to tax is the power to destroy, and . . . to concede the States such power would place at their mercy the Constitution's affirmative grants of authority to the Federal Government – a result the Framers could not have intended").

No question exists that the exercise of tribal court jurisdiction over a State or its political subdivisions can significantly affect the conduct of their sovereign functions. Indeed, it is hard to conceive of a more direct intrusion than the one presented here. Both Congress and the federal courts have consistently recognized "the need to avoid even indirect interference with the state-established procedures for the collection of taxes and the adjudication of disputes concerning the legality of those taxes." Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 121 (1988). Numerous federal statutory and judicial policies strongly favor – if not mandate – state court determination of state tax matters in the first instance. *See, e.g.*, Tax Injunction Act, 28 U.S.C. § 1341 (federal courts prohibited from issuing injunction against collection of state taxes where state remedies available); *Great Lakes Dock & Dredge Co. v. Huffman*, 319 U.S. 293 (1943) (declaratory relief involving state tax matters prohibited); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (damage actions under 42 U.S.C. § 1983 not available against state tax assessors). The tribal court's decision here, and the similar decisions that are likely to follow if this one were to be sustained, place an intolerable burden on one of the County's core governmental functions.

It is in this respect that footnote 24 in *Nevada v. Hall* again becomes significant. Unlike the situation in that case, exercise of tribal court jurisdiction here directly relates to the discharge of core governmental responsibilities. This case presents a controversy falling squarely within the purview of footnote 24 and would, even were two States involved, raise issues over the "federalism constraints on a State's amenability to suit in the courts of another State" referred to by Justice Blackmun in his dissent. 440 U.S. at 431. There can be no real dispute that the majority opinion, by expressly leaving these issues open, did not hold that the immunity defense would always be unavailable since, as Justice Blackmun also observed, the footnote implicitly means that "***some*** state policies might require a different result" and that "the only question is whether the facts of this case are sufficient to call the implicit constitutional right of sovereign immunity into play here." *Id.* (emphasis added). The majority's caution in that regard was justified. In contrast to *Nevada v. Hall*, where the Court found a constitutional rule of immunity lacking, here those same reasons militate in its favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

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CROW TRIBAL COURT

IN AND FOR THE CROW TRIBE OF INDIANS

CROW AGENCY, MONTANA 59022

CARL PEASE, Plaintiff, vs. YELLOWSTONE COUNTY, Defendant.	)	Civil No. 91-209 STIPULATED FACTS

Carl Pease, Plaintiff, and Yellowstone County, Defendant, stipulate to the following facts in this matter:

1. Plaintiff's father, George Pease Jr., received the property in question on July 26, 1923, as part of the 1920 Allotment. George Pease Jr. received a fee simple patent title to the property. Mr. Pease received the property "together with all the rights, privileges, immunities, and appurtenances . . . forever . . . " A copy of the deed giving title of this land to George Pease is attached to Defendant's Brief in Support of its Cross Motion For Summary Judgment as Exhibit "1".

2. The Plaintiff, Carl Pease, failed to pay his first and second half taxes on the land from 1987 to

the present. Yellowstone County attempted to issue a tax deed to the property, but this action was filed which temporarily enjoined Yellowstone County from receiving tax deed to the property.

3. Plaintiff, Carl Pease, is a member of the Crow Tribe, and the land in question lies within the boundaries of the Crow Reservation. The Plaintiff acquired the land in question from his father, George Pease, Jr. There is no record that George Pease, Jr. ever requested a fee patent to this land.

Dated this ___ day of February 1994.

/s/ Russell C. Fagg
Russell C. Fagg
Deputy Yellowstone County Attorney
Attorney for Defendant

/s/ D. Michael Eakin
D. Michael Eakin,
Attorney for Plaintiff
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2442 First Avenue North
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(3)

Supreme Court, U.S.
FILED
MAR 17 1997
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No. 96-1204

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CARL PEASE,
Petitioner

v.

YELLOWSTONE COUNTY, a political subdivision of the State of Montana
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
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REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. *A-1 CONTRACTORS* DOES AFFECT THIS MATTER.

Yellowstone County advanced two grounds for denying certiorari. First it argued that if *Strate v. A-1 Contractors,* No. 95-1872, *cert. granted*, 117 S.Ct. 37 (1996), is affirmed, there would be no reason to grant certiorari. This would be true if this Court says nothing new in its decision. However, Pease believes this Court grants certiorari to address important issues. Rule 10, Rules of the Supreme Court. It is likely that this court will shed significant light on the extent of civil jurisdiction of tribal courts over non-Indians. *A-1*

Contractors will have an effect on what jurisdiction the Crow Tribe can assert over non-Indians. What effect it will have on the Ninth Circuit's decision, if any, is appropriately first addressed by the Ninth Circuit, and at its discretion, the district court.

II. THE INDEPENDENT GROUND THEORY DOES NOT JUSTIFY DENYING CERTIORARI.

A. SOVEREIGN IMMUNITY WAS NOT ADDRESSED BELOW.

Yellowstone County argues that certiorari should be denied because the judgment could be affirmed on an independent ground, the county's sovereign immunity. Neither the district court nor the Ninth Circuit addressed the sovereign immunity issue. The Ninth Circuit specifically did not rule on the issue. Ninth Circuit opinion at n.8, App. 19a. The district court never mentioned the issue in its decision. App. 21a-27a. This Court generally does "not address arguments that were not the basis for the decision below," *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. __, 116 S.Ct. 880, at n. 5 (1996); *Holly Farms* v. *National Labor Relations Board*, 516 U.S. __, 116 S.Ct. 1396, 1402 at n. 7 (1996).

While the County makes an extensive argument on the merits of this independent ground, the only authority cited where the argument was adopted was a district court case that is pending on appeal. *Montana v. Gilham*, 932 F.Supp 1215 (D. Mont 1996), *appeal docketed* (9th Cir. July 18, 1996)(No. 96-35766). *See,* Brief in Opposition at 6. Rather

than relying a case in which judgment on appeal has yet to be rendered, the wiser course would be to grant the petition for certiorari in this case and remand for consideration of the sovereign immunity issue.

B. THE "INDEPENDENT GROUND" WAS NOT TIMELY RAISED.

It should also be noted that the sovereign immunity issue was never raised in the tribal court. Denying certiorari on the basis of an argument that was never presented to the tribal court would allow the county to bypass the requirement that jurisdictional defenses first be presented to the tribal court before bringing a collateral attack in the federal courts. Before an action can be maintained in the federal courts to challenge the jurisdiction of a tribal court, the party challenging the tribe's jurisdiction must give the tribal court a "full opportunity" to pass upon any jurisdictional defenses[1]. *National Farmers Union v. Crow Tribe*, 471 U.S. 845 at 857 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 487 U.S. 9 at 16 (1987). While the County may have exhausted tribal remedies, it failed to raise in the tribal court the defense that it now seeks to use a basis to deny certiorari.

Giving the tribal court a full opportunity to address an issue is more than a mere ministerial act; it is important to federal courts. "[T]he orderly administration of justice in the federal

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[1]Pease does not concede that sovereign immunity is jurisdictional in nature as opposed to an affirmative defense.

courts will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union*, 471 U.S. at 856. Failure to raise the sovereign immunity argument in the tribal court did not give the tribal court a "full opportunity" to address the issue. Certiorari should not be denied on an independent ground never addressed by the courts below and not raised in the court of first impression.

C. THE COUNTY DOES NOT ENJOY SOVEREIGN IMMUNITY.

There does not appear to be definitive authority on a county's sovereign immunity in tribal court[2], but the clear implication of other authority indicates that local governments are not immune. The alleged tortfeasor in the underlying tribal court action in *National Farmers Union* was the Lodge Grass school district, a political subdivision of the state. If sovereign immunity were a clear jurisdictional prohibition against a tribe asserting jurisdiction over a political subdivision of a state, exhaustion of the tribal remedies would not have been necessary. *National Farmers Union* at n. 21. Additionally, *LaPlante* and *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), indicate that tribes retain jurisdiction unless Congress divests them of such jurisdiction. The implication from reading these cases together is that tribes

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[2]The issue may be decided for the Ninth Circuit in *Lewis County v. Allen*, No. 94-35979 (9th Cir.), appeal pending.

have jurisdiction over local governmental entities unless or until Congress says otherwise. This Court should conclude that the issue of sovereign immunity needs to be developed in the courts below before this court uses it as an independent basis to deny certiorari.

CONCLUSION

The petition should be granted, the decision below vacated, and the matter remanded for further consideration consistent with *A-1 Contractors.*

Respectfully Submitted,

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